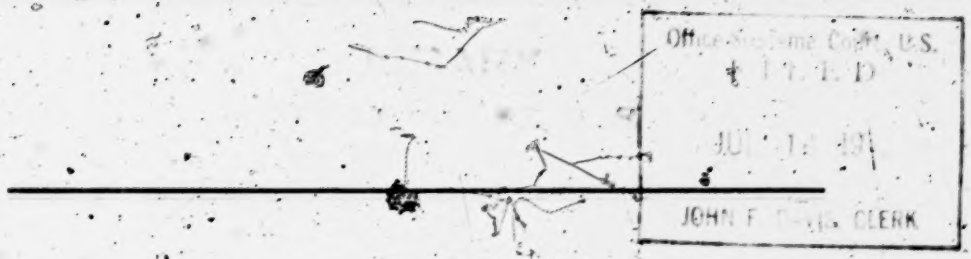

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 254

BILLY GILBERT NICHOLSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

BILLY GILBERT NICHOLSON, Claimant of $7,198.00 in United States Money,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITIONS FOR WRITS OF CERTIORARI, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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PETITIONS FOR WRITS OF CERTIORARI, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To: The Honorable, The Chief Justice of The United States and The Associate Justices of The Supreme Court of the United States

The petitioner prays that writs of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above causes, entered May 24, 1962, affirming the judgment of the United States District Court for the Middle District of Tennessee. Extensions of time for filing the petitions for writs of certiorari were granted on June 22, 1962, by Mr. Justice Potter Stewart,

extending the time for the filing of these petitions until July 18, 1962. The cases were consolidated for hearing in the District Court and the Court of Appeals, and contain identical questions of law and fact.

Opinion Below

The opinion of the Court of Appeals affirming the judgment of the District Court has not been generally reported. A copy is appended hereto as Appendix A. The opinion of the District Court has not been generally reported, but is appended hereto as Appendix B. The District Court entered judgment in criminal cause, No. 14,807, sentencing the petitioner to six (6) months imprisonment and a One Thousand ($1,000.00) Dollars fine, and further found against the petitioner in the companion libel case, No. 14,567, requiring forfeiture of $7,198.00 of United States money.

Jurisdiction

The jurisdiction to review the judgments is conferred on this Court by Title 28, U.S.C., Section 1254(1).

Questions Presented

1. Does sufficient probable cause exist to justify the issuance of a search warrant to search a man's residence, when the facts stated in the affidavits to the search warrant consist of allegations that two (2) telephones were located at the person's residence, which had the subject of two hundred ninety three (293) long distance telephone calls charged to these telephones during a one hundred five (105) day period prior to the issuance of the search warrant, that a party living at the said residence was a known gambler, and that some of these calls went to telephones subscribed to by persons in other cities who were holders of the occu-

pational wagering tax stamp issued by the Internal Revenue Service of the United States?

Statutes Involved

The questions presented herein raise issues under 26 U.S.C., 4411, 4412, 7203, 7262, commonly known as the occupational wagering tax statutes, and the U. S. Constitution, 4th Amendment, the text of which appear in Appendix C.

Statement of the Case

This petition raises an important question as to the sufficiency of the "long distance telephone charting system" now commonly employed by the Internal Revenue Service of the United States to obtain issuance of search warrants where violations of the occupational wagering tax stamp statutes are suspected. The charting method for the issuance of search warrants for the arrest without a search warrant has been the subject of considerable litigation in the lower Federal Courts: U.S. v. Schwartz, 151 F. Supp. 399 (W.D. Pa.); U.S. v. Jacobsen, 198 F. Supp. 386 (D.C. Conn.); Contra: U.S. v. Lassoff, 147 F. Supp. 944 (W.D. Ky.)

However, the instant case is unique in that it is the only case where the affidavits to the search warrant do not contain any factual information independently corroborative of the hearsay report of the Internal Revenue agents charting long distance calls. Since the affidavits do not indicate that any informant was relied upon by the agents to establish probable cause, it is believed that the instant case represents a substantial departure from *Jones* v. *United States*, 362 U.S. 257.

The affidavits to the search warrant and the evidence heard on the hearing of the motion to suppress certain

evidence taken from the home of the petitioner uncontrovertedly show:

1. The Internal Revenue agents had no confidential information from any informant that the defendant was engaged in a book-making operation. cf: *Jones* v. *United States*, 362 U.S. 257.

2. The surveillance made by the agents did not indicate any suspicious activity at the premises to be searched.

3. There was no regular pattern of activity of the petitioner known to the agents, either by hearsay or by direct observable knowledge, which conformed to the known patterns of the book-making business.

On April 25, 1960, Special Agents James K. Smith and Francis C. Smith of the Internal Revenue Service appeared before the United States Commissioner for the Middle District of Tennessee and executed affidavits for a search warrant to search the petitioner's residence at 2806 Wedgewood Avenue, Nashville, Tennessee. See Appendix D.

Pursuant to said affidavits, the Commissioner on said date issued a search warrant for said premises, which search warrant was executed on April 27, 1960.

The facts in the affidavits to said search warrant may be summarized as follows:

That according to the records of the Southern Bell Telephone and Telegraph Company, two (2) telephones located at the petitioner's residence, one of which was subscribed to in the name of an alias, sometimes used by the petitioner, had been the subject of a large amount of long distance telephone activity; that approximately two hundred ninety-three (293) long distance calls were charged to these two (2) telephones during the one hundred five (105) day period from January 1, 1960, to April 15, 1960. That a number of these calls were made to telephone numbers in other

cities, said phones being subscribed to by persons who were known gamblers and who had registered and were holders of the occupational wagering stamp issued by the Internal Revenue Service; that the petitioner, Nicholson, was a known gambler and book-maker in the Nashville area and had been arrested previously for gambling and book-making activities at said residence by Federal officers and had been arrested by City officers for gambling activity; that such long distance phone call activity, as set forth in the affidavit, is a characteristic of a book-making operation; that the agents, from the information above, had reason to believe that Billy Gilbert Nicholson and/or others were conducting a book-making operation at said residence, and said Nicholson had not registered for the occupational wagering stamp.

On hearing of the petitioner's motion to suppress evidence, it was stipulated that in regard to the petitioner having been previously arrested for book-making activity by Federal officers, that the only arrest made was some five (5) years previous, in 1955, and that a no true bill was returned in the cause; and that, in regard to any arrest of the petitioner by City of Nashville police officers, he had never been convicted for gambling activities. (R. p. 5-6).

Agent James K. Smith, whose affidavit was the primary affidavit for the issuance of the search warrant, admitted at the hearing that he had had no information, hearsay or otherwise, during the five (5) years from 1955 to the date of the issuance of the search warrant, April 25, 1960, that Billy Gilbert Nicholson had engaged in any book-making activity in the city of Nashville, Tennessee or had received or taken wagers from anyone (R. p. 60). Said agent further admitted that a surveillance made of the premises, before the obtaining of the search warrant,

showed nothing unusual or suspicious about the premises to be searched (R. p. 58).

Both the District Court and the United States Court of Appeals for the Sixth Circuit held that the volume of long distance telephone calls, and the inferences to be derived from the character of the parties subscribing to many of the phones called, were sufficient to justify a reasonably cautious man in believing that a violation of the occupational wagering tax stamp statutes had occurred. The property seized by virtue of said search provided the circumstantial evidence upon which petitioner was convicted.

The Question Is Substantial

It is submitted that the procedures utilized to obtain the issuance of the search warrant in the instant cause are of such questionable validity and the issues involved are of such widespread importance as to justify the issuance of the petitions.

Petitioner submits that probable cause does not exist for the issuance of a search warrant or suspected violations of said statutes, without some further factual information independently corroborative of the inferences to be derived from the long distance telephone call charting method. The Attorney General of the United States and the local United States District Attorneys are vigorously pressing for indictments of individuals accused of violating the occupational gambling tax statutes, and although the volume of litigation is large today, it will undoubtedly increase due to the avowed public position of the Attorney General. It is believed that this cause presents squarely the issue of whether the naked use of the long distance telephone charting system alone may support the issuance of a search warrant. If the opinion of the United States Court of Appeals for the Sixth Circuit is not reviewed, it will become

a leading precedent for the widespread, increased use of such method.

The Question Presented

Jones v. *United States*, 362 U.S., established that an affidavit consisting primarily of hearsay information obtained from a reliable informant may be sufficient to support the issuance of a search warrant. A qualification on *Jones* has been stated by the Second Circuit in *United States* v. *Ramirez*, 279 Fed.2d 712 (CA 2), Waterman, J.:

> (5) "Jones v. United States, 362 U.S. 257, 267-272, 80 S.Ct. 725, 734-736, 4 L.Ed.2d 697 (March 28, 1960) has now established that an affidavit consisting primarily of hearsay information may be sufficient to support the issuance of a search warrant. However, the requirement that the affiant shall have personal knowledge still exists, for, under Jones, the affiant must not only believe the hearsay report, but, in all likelihood, the affiant must further demonstrate that his informant has established a reputation for reliability so as to be worthy of belief. *In addition, Jones may require that the affidavit include some factual information independently corroborative of the hearsay report . . .*" (Emphasis supplied)
>
> *United States* v. *Ramirez*, 279 F.2d 712 at p. 715.

In the case at bar, there was no information from a reliable informant; there was only a hearsay report made up by the agents, which was not corroborated *in any respect.* There were less than three (3) long distance telephone calls per day made to or from the telephones at the residence to be searched. Such volume of activity was not unusual in the year 1960. Many residences throughout the country have two (2) telephones and a large number of

long distance telephone calls are made daily on such telephones.

Further, petitioner may well have been engaged in gambling on his own behalf as contended at trial. It was undisputed that the telephone calls were made to parties who were registered for the occupational wagering tax stamp, and as such, were not violating the statutes of the United States in accepting wagers. To allow a search of a residence under the facts presented in this cause would justify the issuance of search warrants for the search of the residence of a person never previously convicted of a crime simply on the basis of the amount of long distance telephone activity, if a portion of these calls were made to parties who were known to be gamblers. Such a rule cannot be justified under our traditional concepts of the constitutional prohibition against unreasonable searches of a man's residence.

Of course, there has been some latitude granted regarding the searches of moving automobiles and the like, because of the transitory nature of the crime suspected. Before a search of a person's residence should be authorized, Government agents should have possession of such other and further knowledge that would corroborate or strengthen the inferences and suspicions that may be derived from long distance telephone call activity.

One District Court has sustained the validity of the position asserted by the petitioner. In *United States* v. *Lassoff*, 147 F. Supp. 944 (E. D. Ky., Swinford, Judge), the Court first found the search warrant to be defective because only conclusions were set out in the affidavit. However, the United States then took the position (See 147 F. Supp. 949) that if the search warrant was invalid, the motion to suppress should have been overruled because there was sufficient evidence known to the agents which formed valid grounds for a lawful arrest without a search warrant.

The grounds relied on by the Government were very similar to those set forth in the affidavits in the search warrant in the instant cause.

Judge Swinford, in his decision, sustained the motion to suppress and stated the following:

> ". . . The facts in the knowledge of the agents at the time they broke the outer door of the building ascended the steps to the second floor and broke down the doors into the second floor rooms were merely the result of nothing more than hearsay acquired at the conference in Pittsburgh. There was certainly nothing in their observation of the building while they held it under surveillance that would justify their believing that a felony was being committed on the second floor of the building. Even the records of the telephone agencies in the local area, which may be considered as valid first-hand information about which the agents could testify before a jury, indicated no law violation unless coupled to the information acquired at the Pittsburgh conference. *It is true they had knowledge of numerous long distance telephone calls from the 1045 Monmouth Street address but that alone is not sufficient, nor does it appear to be so unreasonable as to indicate that the occupants of the building were engaged in operating a handbook for wagers on sporting events . . .*'" (Emphasis supplied)

United States v. *Lassoff*, 147 F. Supp. 944, 952, 953.

The United States Court of Appeals in the case at bar relied primarily on the rule of law that probable cause requires an act of judgment formed in light of the particular situation, and that because many situations are more or less ambiguous, a determination that probable cause exists and should be accepted unless it is shown that the U. S.

Commissioner's judgment was arbitrarily exercised. Although this is the law, the Courts should always examine the particular situation to determine whether probable cause exists.

Contrasted to the instant case is *United States* v. *Jacobsen*, 198 F. Supp. 386, (D.C. Conn.) where the agents utilized the charting system together with information received from two (2) reliable informers who had furnished reliable information in the past to search premises occupied by a certain known book-maker who was engaging in book-making activities. Petitioner has no quarrel that the *Jacobsen* case, as it illustrates the problem in the instant cause. In *Jacobsen*, there was corroboration acceptable under the doctrine of *Jones* v. *United States*, Supra, as the inferences derived from the long distance telephone charting method were verified by information from reliable informers.

It is not difficult for Government agents to obtain such corroboration. Book-makers do not exist in a vacuum. They must do business with many customers. Information from an informant or information obtained from direct wagering is not difficult to obtain. Surveillance of the premises, carried out long enough should always reveal some activities of persons coming in or going out which would be consistent with a book-making operation. Payments have to be made, and collections have to be made. Sooner or later, a book-maker must do both. It is simple enough for agents to corroborate and to implement their suspicions derived from the charting system. The interests of justice should not be subverted by relaxing the rules to uphold searches made on skimpy information spliced together by unenergetic revenue agents.

Conclusion

It is submitted that the Court has jurisdiction and should hear these petitions from a judgment denying a basic constitutional right guaranteed by the United States Constitution.

Respectfully submitted.

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APPENDIX A

Nos. 14567, 14807

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14807

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

BILLY GILBERT NICHOLSON, *Defendant-Appellant.*

No. 14567

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

BILLY GILBERT NICHOLSON, Claimant of $7,198.00 in United States Money, *Defendant-Appellant.*

Decided May 24, 1962.

APPEALS from the United States District Court for the Middle District of Tennessee, Nashville Division

Before: MILLER, Chief Judge, WEICK, Circuit Judge, and STARR, Senior District Judge.

MILLER, Chief Judge. Appellant was proceeded against in the District Court by criminal information which charged in the first count that being a person engaged in the business of accepting wagers, he did wilfully fail and refuse to register, contrary to the provisions of Sections 4411 and 4412, Internal Revenue Code of 1954; and which charged in the second count that being so engaged he failed and refused to pay the special occupational tax imposed by Section 4411, contrary to the provisions of Section 7262, Internal Revenue Code of 1954. He was found guilty by a jury under both counts of the information.

The Government also filed a libel in the same court seek-

ing the forfeiture of $7,198.00 in money, alleging that said money was possessed by the appellant and intended for use by him while carrying on the business of receiving wagers without having paid the special taxes imposed by Section 4411, Internal Revenue Code of 1954. It was agreed that the District Judge could consider the evidence introduced in the criminal case in deciding the libel case. The District Judge found in favor of the Government on the libel cause.

The appeals in the two cases were heard together in this Court.

Appellant's main contention is that the District Judge erred in refusing to grant his motion to suppress certain evidence on the ground that the affidavits upon which the search warrant was issued were not sufficient to justify the issuance of the warrant, and that the District Judge erred in denying his motion for judgment of acquittal.

The affidavits, executed by two special agents of the Internal Revenue Service, stated that appellant was residing at premises of his mother-in-law, described as 2806 Westwood Avenue, Nashville, Tennessee, that he was a known gambler and bookmaker in the Nashville area, that his mother-in-law was the subscriber to one telephone in the premises, that two additional telephones in the premises were subscribed to in the name of Robert Walker, which name was an alias sometimes used by appellant, that a known bookmaking operator in New Orleans, Louisiana, had made numerous long distance telephone calls to one of the numbers listed in the name of Robert Walker, that from January 1, 1960, to April 15, 1960, approximately 293 long distance calls were charged to the two Robert Walker numbers, that many of these calls were made to phones which were subscribed to and used by persons who were known gamblers and bookmakers in Birmingham, Alabama, and Biloxi, Mississippi, that numerous long distance calls were made to these two numbers from phones in other cities listed in the names of known gamblers and bookmakers in Clarkson, Georgia, Philadelphia, Pennsylvania, and Jacksonville, Florida, and that such long distance phone call activity was a characteristic of the bookmaking operation. The Commissioner was of the opinion that there was probable cause to believe

that certain property, which was being used in violation of Sections 4411, 4412 and 7203 of the Internal Revenue Code of 1954 was being concealed in the described premises and issued the search warrant, in the execution of which property was found, which was later used in the trial under the two counts of the information.

In support of his contention that the facts stated in the affidavits did not constitute probable cause, appellant relies largely upon what the affidavits do not state, rather than an analysis of what they do state. He points out that the agents had no information that appellant was conducting a bookmaking operation at the described premises, that they had no information that appellant had accepted a wager in the five years preceding the raid, that there was no evidence that appellant had ever been convicted for gambling activities, and that there was no evidence of people going in or coming out of the premises or of any suspicious activity about the premises.

The absence of such facts was a matter which was properly for the consideration of the jury in the trial on the merits. But there is a difference in what is required to show probable cause for an arrest or search and what is required to prove guilt in a criminal case. Probable cause sufficient for the issuance of a search warrant deals with probabilities. Conviction in a criminal case requires proof beyond a reasonable doubt. *Brinegar* v. *United States*, 338 U. S. 160, 174-175. The absence of facts which might cause the jury to have a reasonable doubt of a defendant's guilt does not mean that the facts which are stated are not sufficient to constitute probable cause for the execution of a search warrant. Probable cause may exist even though in the execution of the warrant nothing is found. *United States* v. *Eisner*, 297 F (2) 595, 597, C.A. 6th.

Probable cause exists where the facts and circumstances within the officer's knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brienegar* v. *United States, supra*, 338 U. S. 175-176; *Draper* v. *United States*, 358 U. S. 307. Whether probable cause exists requires

an act of judgment formed in the light of the particular situation and with account taken of all the circumstances. Because many situations are more or less ambiguous, a determination that probable cause exists should be accepted by this Court unless it is shown that the Commissioner's judgment was arbitrarily exercised. *Brinegar v. United States, supra*, 338 U. S. 176; *Merritt v. United States*, 249 F. (2) 19, 20; C. A. 6th. We are of the opinion that the search warrant was legally issued and that the motion to suppress the evidence was properly overruled. *United States v. Schwartz*, 151 F. Supp. 399 W. D. Pa.

In the trial on the merits, the appellant's defense was that he was not a bookmaker but was a gambler who made his living by betting on his own behalf on various sporting events throughout the country. In addition to evidence about the two telephones and the long distance calls between appellant and gamblers who possessed occupational wagering stamps, the Government introduced in evidence various articles found in the search of the premises, including a piece of charred paper with initials and numbers on the remains, some twenty sheets of flash paper, which was paper chemically treated so as to be totally consumed by fire almost instantaneously, a wall blackboard, three boxes of white chalk, a box containing some 900 calling cards with "Call Bill or Herb" written on them with the two telephone numbers on the back sides, cash in the amount of $6,498.00 from appellant's pocket and in the additional amount of $700.00 in a small locked safe, and several sports publications of some of which there were 25 copies. There was also evidence that some paper was smouldering as the agents entered the room, and that the two telephone numbers were unlisted numbers. Although appellant claimed to be a gambler on his own behalf, he had not so stated his occupation on his Federal Income Tax returns and he did not make such a claim at the time of his arrest. It is not a federal offense to make bets on your own behalf. In explanation of the two unlisted telephones he answered the question "Did it require you to have two telephones just to carry on the regular betting business?" by saying "Well, I would say that it wouldn't hurt you any to have two",

with the later explanation "Two's almost as cheap as one. There's not much difference." He later admitted that it cost him twice as much for two phones as it did for one, but that "you get double the use out of them."

Although the evidence of appellant's guilt was entirely circumstantial, we are of the opinion that it was sufficient to take the case to the jury and to support the verdict. *United States* v. *Comer*, 288 F (2) 174, 175, C. A. 6th; *United States* v. *Baxter*, 289 F (2) 487, C. A. 6th; *United States* v. *Leggett and Eleveld*, 292 F (2) 423, 426-427, C. A. 6th; *Holland* v. *United States*, 348 U. S. 121, 139-140.

We have considered other questions raised by appellant but are of the opinion in accordance with the views expressed by the District Judge in overruling appellant's motion for a new trial, that no prejudicial error was committed.

The judgment is affirmed in each case.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

No. 12,904.

UNITED STATES OF AMERICA,

v.

BILLY GILBERT NICHOLSON.

MEMORANDUM

(Received for Entry Sep. 22, 1961)

This cause is before the Court upon the defendant's motion for a new trial on the following grounds:

(1) That the Court erred in failing to grant defendant's motion to suppress certain evidence on the ground that the search warrant and the supporting affidavits contained no competent and credible evidence upon which a finding of probable cause could be made to justify the issuance of the search warrant.

(2) The failure of the Court to overrule the defendant's objection to the admission of certain evidence: evidence obtained in the 1955 raid; the admission of the alleged identification of letters by Agent Smith based on information obtained as a result of the 1955 raid, and the admission of opinion evidence given by Agent Smith as to the effect to be given the initials and numbers found on the photograph.

(3) The failure of the Court to grant the defendant's motion for a directed verdict.

The Existence of Probable Cause for the Issuance of the Search Warrant

The term probable cause when used in this connection has been defined "as a reasonable ground of suspicion, supported by circumstances strong in themselves to war-

rant a cautious man in the belief that the person accused is guilty of the offense with which he is charged." Wharton, Criminal Procedure, Sec. 1541. The belief need not be actual or impart absolute certainty but only a reasonable ground for a belief of guilt. Brinegar v. United States, 338 U. S. 160 (1949). Mere affirmance of belief or suspicion is not enough. The warrant will issue only upon evidence which would lead a man of prudence and caution to believe that the offense has been committed, but the quantum of evidence necessary to show probable cause need not be sufficient to support a verdict of guilty. Wharton, supra, at Sec. 1542.

The defendant relies upon the following proposition of law:

> ". . . A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury (Giles v. United States, 284 F. 208, C. A. 1; *Wagner* v. *United States*, 8 F. 2d 581, C. A. 8); and would lead a man of prudence and caution to believe that the offense has been committed. (Steele v. United States, 262 U. S. 498, 504). Tested by these standards, the affidavit was insufficient." Grau v. United States, 287 U. S. 124, 128.

The United States Supreme Court in Brinegar v. United States, 338 U. S. 160, 174 (1949), expressly found that the *Grau* quotation was dictum and that there is no authority in the decisions of the Court to support it. The Court in the Brinegar case sustained the trial court's admission of hearsay testimony for the purpose of showing the existence of probable cause but rejection of the same evidence on the issue of guilt. Cf. Jones v. United States, 362 U. S. 257, 271 (1960), holding that hearsay evidence may be the basis for a finding of probable cause.

The case of Merritt v. United States, 249 F. 2d 19 (6th Cir. 1957), is particularly apposite to the case at bar. The search warrant was deemed valid where a finding of probable cause was made upon allegations in the affidavit of defendant's activities which were classified as conforming to the known activities of persons in the numbers business.

The Court further stated that the Commissioner's determination of the existence of probable cause was conclusive unless his judgment was arbitrarily exercised. It seems clear upon an examination of the two affidavits submitted to the Commissioner, that his finding of probable cause that a crime was being committed on the subject premises was not arbitrary. Affiant James K. Smith, Special Agent, of the Intelligence Division, Internal Revenue Service, U.S. Treasury Department, made oath that a known bookmaking operator in New Orleans, Louisiana, had made numerous long distance telephone calls to CY 7-5534, Nashville, Tennessee; that approximately 293 calls were charged to CY 7-5534 and CY 7-5535 from January 1, 1960 to April 15, 1960; that numerous calls were made from these numbers to Mississippi, Georgia and several Alabama numbers, these phones being subscribed to and used by known bookmakers and gamblers; that CY 7-5534 and CY 7-5535 are subscribed to by Robert Walker, a known alias of the defendant; that the defendant had not been issued a federal wagering stamp; that such long distance telephoning activity is a characteristic of the bookmaking operation; and that the defendant is a known gambler and bookmaker in the Nashville area, having been arrested by city and federal authorities in this connection for taking bets at the same place that was then sought to be searched.

The government and the defendant in their respective briefs discuss two district court opinions which are similar on this point to the instant case. Both cases concerned the validity of a search of premises suspected of housing illegal bookmaking activity. United States v. Lassoff, 147 F. Supp. 944 (E. D. Ky. 1957), involved the question of whether there was probable cause for the issuance of a search warrant on the following statements presented by affidavit.

> "That affiant together with certain of his agents is engaged in making an examination of this situation in Newport, Kentucky; that he has learned that the premises described are being used in a gambling activity; that records of such activity are being kept at such premises; that affiant has verified that no

gambling stamp has been issued to any person at 1045 Monmouth Street, Newport, Kentucky."

The Court held that the sworn statements were not sufficient to justify a finding of probable cause as the affidavit contained no substantial *facts* but *conclusions* of the affiant.

United States v. Schwartz, 151 F. Supp. 339 (W. D. Pa. 1957), involved the same question. However, in that case, the affiant's statements contained the averments that a substantial number of long distance calls were made from the subject's residence to persons who had reputations or records of bookmaking activity. The Court distinguished the *Lassoff* case and held that there were sufficient facts alleged to justify the issuance of the warrant.

Upon a careful examination of the affidavits and upon authority of the cases cited, the Court is of the opinion that there was a sufficient statement of facts to justify the Commissioner's finding that a crime was being committed.

The Sufficiency of the Evidence to Support the Verdict of Guilty

At the outset it must be said that the government's case is essentially circumstantial. There is no direct evidence to the effect that the defendant was accepting bets in violation of Sec. 7203, Internal Revenue Code of 1954.

The defendant contends that for circumstantial evidence to be sufficient the facts must exclude every other reasonable hypothesis except that of guilt. This proposition is, however, not the law. The United States Supreme Court has unequivocally stated that all that is required is that the jury be convinced beyond a reasonable doubt. Circumstantial evidence is intrinsically no different from direct or testimonial evidence. Holland v. United States (1954), 34 U. S. 121.

A summary of the government's evidence is as follows:

"1. (a) The defendant had two telephones in his residence listed under aliases with the telephone company.

(b) During the last thirty (30) day period checked before the raid, sixty-five (65) long distance calls were made to and from the residence, and during the one hundred eighteen (118) days before the raid, two hundred ninety-three (293) such calls were charged to the two (2) numbers (Tr. 55).

(c) A number of these calls were made to known gamblers in other cities.

2. There was found in the room a piece of charred paper with initials and numbers on the remains.

3. There were some twenty (20) sheets of flash paper found, and the desk was scarred by burned flash paper. There was smoke in the air when the government's agents entered the house.

4. There was found in the room a blackboard on which was listed certain baseball pitchers and their previous years' earned run averages.

5. A box containing some nine hundred (900) calling cards was found with 'Call Bill or Herb' and the telephone numbers on the back side.

6. Six Thousand Four Hundred Ninety-Eight ($6,498.00) Dollars in cash was found in the defendant's pocket, and Seven Hundred ($700.00) Dollars was found in a small locked safe.

7. Numerous sports publications, many of them in large quantities, were found."

The defendant takes the position that certain matters, normally associated with gambling, were not found, and secondly, that the items of the government's proof are not inconsistent with innocence. But it is only necessary that sufficient evidence consistent with guilt be adduced to justify a finding of guilt beyond a reasonable doubt. The Court is of the opinion that the government has presented such a case.

The Inadmissibility of Certain Evidence

Agent Smith testified that the charred remains of a piece of paper were found on the premises during the search and he identified and introduced into evidence a

large photograph thereof. He further testified that he was able to identify as one of three names on the bits of paper the name of "Leo L.", and that the same name was found on a previous occasion in 1955 during a raid on the same premises. At that time he identified "Leo L." as a person named Leo Levison, and in explaining his identification he testified that in 1955, when the Nicholson place was raided, actual betting tickets were seized with "Leo L." thereon, and that he also found some mailing addresses on the premises having the name of Leo Levison. Agent Smith then testified that "we contacted Mr. Levison and he gave us an affidavit that that was his bets identified as Leo L." Objection was made to the testimony of Agent Smith identifying the name appearing on the slips of paper. The Court sustained the objection with respect to that portion of the testimony in which Smith stated that an affidavit had been obtained from Mr. Levison identifying the name of Leo L. on the slips of paper as his own. However, the Court overruled the objection as to the remainder of the testimony. The defendant in his motion for a new trial assigns this ruling of the Court as error. However, the Court is of the opinion that with the testimony as to the affidavit stricken, the remainder of the evidence was not based upon hearsay. Smith testified (aside from the affidavit) that his identification of "Leo L." as Leo Levison was also made by comparing the slips of paper with the mailing addresses, all of which were found on a previous occasion in a raid. This was direct testimony based upon Smith's own observations and was competent to go to the jury to determine whether Leo L. and Leo Levison were one and the same person.

The defendant further objects that the Court was in error in allowing Smith to testify that J. Robeno, whose name was also found on the slips of paper, was a well known gambler in Birmingham. It appears that Smith testified categorically to this effect and in the absence of cross-examination by defendant's counsel, it could not be known just what the witnesses' source of information was. If such information was actually based upon hearsay, it was incumbent upon defendant's counsel to explore the

matter and by cross-examination disclose to the Court facts which would render the testimony incompetent. If it then developed that the testimony was based upon hearsay, an appropriate objection could have been made. Since this course was not followed, the Court can see no reason why the evidence is not competent.

The third objection is that some of Agent Smith's testimony represented his opinions and conclusions and therefore was improperly admitted. This objection has no merit for the Court correctly allowed Smith to testify as an expert after the government had laid a proper foundation. The use of such "expert testimony" is proper when the subject matter of an inquiry is so far removed from the realm of common experience that the ordinary jury cannot fairly be expected to draw a correct inference from the facts. 32 C. J. S. 217. A test of admissibility of expert testimony is whether the jury would be aided by receiving the evidence. These tests readily attach to the factual situation in the instant case. The jurors can reasonably be said to be unacquainted with the operation of a bookmaking establishment and the testimony of a properly qualified expert as to the general characteristics, practices, and procedures of such an operation would be of material assistance to the jury. There was no error in the admission of Agent Smith's testimony in this respect.

The motion for a new trial is without merit and must be overruled.

s/ WM. E. MILLER,
United States District Judge.

APPENDIX C

Sec. 4411. Imposition of tax

"There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 527."

Sec. 4412. Registration

(a) "Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 527."

Sec. 7203. Willful failure to file return, supply information, or pay tax

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 851."

Sec. 7262. Violation of occupational tax laws relating to wagering-Failure to pay special tax

"Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 862."

U. S. Constitution—Amendment (IV)

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

APPENDIX D

(Filed Jun. 29, 1960.)

UNITED STATES DISTRICT COURT FOR THE MIDDLE JUDICIAL DISTRICT OF TENNESSEE

Commissioner's Docket No. 40

Case No. 5301

Affidavit for Search Warrant.

UNITED STATES OF AMERICA,

v.

PREMISE KNOWN AS 2806 WESTWOOD AVENUE, NASHVILLE, TENNESSEE.

AFFIDAVIT FOR SEARCH WARRANT.

(Filed Jun. 29, 1960)

Before J. WASHINGTON MOORE, Nashville, Tennessee:
Name of Commissioner Address of Commissioner

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as 2806 Westwood Avenue, Nashville, Tennessee, further described as being the fourth house on the north side of Westwood Avenue and being west from the intersection of Westwood Avenue and Natchez Trace as shown in attached sketch in the Middle Judicial District of Tennessee, there is now being concealed certain property, namely bookmaking records, wagering paraphernalia consisting of bet slips,
here describe property

run-down sheets, account sheets, recap sheets, and money used in or derived from a booking operation which are being used in violation of Section 4411, 4412 and 7203 of the
here give alleged grounds for search and seizure

Internal Revenue Code of 1954.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: I am a Special Agent of the Intelligence Division, Internal Revenue Service, U. S. Treasury Department, assigned to the Nashville, Tennessee District office of the Atlanta, Georgia, Region. In connection with the performance of my duties and upon examination of the official records of the Intelligence Division, I found that a known bookmaking operator in New Orleans, Louisiana, has made numerous long distance telephone calls to telephone number CYpress 7-5534, Nashville, Tennessee.

Upon examination of the records of the Southern Bell Telephone and Telegraph Company, Nashville, Tennessee, I found that phone number CYpress 7-5534 and CYpress 7-5535 are subscribed to by Robert Walker and are located in the premises of 2808 Westwood Avenue, Nashville, Tennessee. I further found that a person by the name of Mable Hutcheson is the subscriber to phone number CYpress 7-1460 also located in the premises of 2806 Westwood Avenue.

JAMES K. SMITH,
Signature of Affiant.

Special Agent JAMES K. SMITH,
Official Title, If Any.

Sworn to before me, and subscribed in my presence April 25, 1960.

J. WASHINGTON MOORE,
United States Commissioner.

The official records of the Intelligence Division further reveal that the name Robert Walker is an alias sometimes used by Billy Gilbert Nicholson, that Billy Nicholson married a daughter of Mable Hutcheson in December, 1950 and that both have resided with Mrs. Hutcheson at 2806 Westwood from time to time. Current observations reveal that Billy Nicholson is presently residing at 2806 Westwood Avenue.

Billy Nicholson is a known gambler and bookmaker in the Nashville area and has been arrested by city and fed-

eral law enforcement officers in connection with gambling and bookmaking activities. When arrested by the Federal officers, Nicholson was found to be conducting a bookmaking operation from the address of 2806 Westwood Avenue, Nashville, Tennessee. I personally participated in this arrest and observed the bookmaking operation at this address.

My examination of the records of Southern Bell Telephone and Telegraph Company records revealed that numerous long distance calls were being made to and from telephone number CYpress 7-5534 and CYpress 7-5535, located at 2806 Westwood Avenue and that from the period January 1, 1960 to April 15, 1960, approximately 293 such long distance calls were charged to these numbers. My examination of these long distance calls further revealed that numerous calls were being made to the telephone numbers listed below:

Phone Number	City
TR 9-0401	Birmingham, Alabama
ID 2-2633	Biloxi, Mississippi

The official records of the Intelligence Division compiled from examination of the records of the Telephone Company and investigation made of the subscribers to the above listed phones reveal that these phones are subscribed to and used by persons who are known gamblers and bookmakers in Birmingham, Alabama, and Biloxi, Mississippi. For additional information regarding Birmingham phone TR 9-0401 see attached affidavit of Special Agent F. C. Smith.

The official records of the Intelligence Division, compiled from investigation made by agents of the Atlanta Region, reveal that numerous long distance phone calls have been made to CYpress 7-5534 and CYpress 7-5535, Nashville, Tennessee, located at 2806 Westwood Avenue, from the following listed phone numbers in other cities and that the subscribers to the phone numbers listed below are known gamblers and bookmakers.

Phone Number	City	Subscriber
HI 3-7111	Clarkson, Georgia	Johnny O. Tyler
HI 3-7112	" "	" "
HI 3-7113	" "	" "
HI 3-7114	" "	" "
LI 8-7154	Philadelphia, Penn.	Emanuel Mandeiblatt
EX 8-4321	Jacksonville, Florida	C. J. Williams

The official records of the Intelligence Division further reveal that Johnny O. Tyler, listed above, is the holder of a current wagering-occupational stamp with the District Director of Internal Revenue, Atlanta, Georgia.

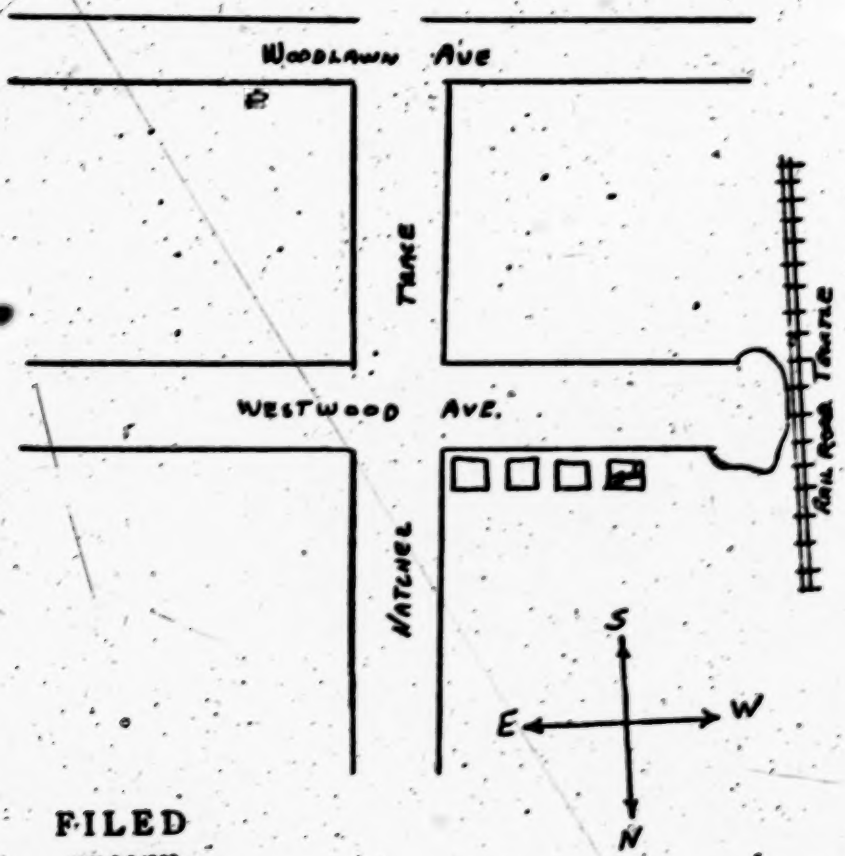
Long distance phone call activity such as set forth above is a characteristic of the bookmaking operation and the information presented above gives me reason to believe that Billy Nicholson and or others are conducting a bookmaking operation from the address of 2806 Westwood Avenue, Nashville, Tennessee.

I personally made a search of the records of the District Director of Internal Revenue, Nashville, Tennessee, for all wagering-tax stamps issued in the State of Tennessee for the period July 1, 1959 to April 22, 1960 and found no record of registration or issuance of wagering occupational tax stamp to Billy Gilbert Nicholson or any person using the address of 2806 Westwood Avenue, Nashville, Tennessee.

JAMES K. SMITH,
Special Agent,
Intelligence Division,
Nashville District Office,
Atlanta Region.

Sworn to before me, and subscribed in my presence on April 22, 1960.

_____
United States Commissioner.



FILED
JUN 29 1960
JOHN B. ANDERSON, CLERK
D.C.

James K. Smith

UNITED STATES OF AMERICA,
District of Tennessee, ss:

Before J. WASHINGTON MOORE, United States Commissioner for the Middle Judicial District of Tennessee.

The undersigned being duly sworn deposes and says that he has personal knowledge that telephone numbers TRemont 9-0401, TRemont 9-0402, and TRemont 9-0403 in Jefferson County, Alabama, are listed in the name of Superior Sports Service, Incorporated, M. D. Dodson, President, Route No. 13, Box No. 778, Birmingham, Alabama; that M. D. Dodson does reside at the address known as Route No. 13, Box No. 778, Birmingham, Alabama, this being the third house west of the Cahaba river on the north side of Old Looney Mill road.

The undersigned further states that he has personal knowledge that M. D. Dodson is a known gambler and bookmaker and that he has been arrested by both local and federal authorities for his bookmaking activities.

FRANCIS C. SMITH,
Special Agent,
Intelligence Division,
Internal Revenue Service.

Subscribed and sworn to before me this 22nd day of April, 1960, at Nashville, Tennessee.

J. WASHINGTON MOORE,
United States Commissioner.

UNITED STATES DISTRICT COURT FOR THE MIDDLE JUDICIAL DISTRICT OF TENNESSEE

Commissioner's Docket No. 40

Case No. 5301

Search Warrant

UNITED STATES OF AMERICA,

v.

PREMISES KNOWN AS 2806 WESTWOOD AVE., NASHVILLE, TENNESSEE

SEARCH WARRANT

(Filed Jun. 29, 1960)

To James K. Smith or any other special agent of the Intelligence Division, Internal Revenue Service.

Affidavit having been made before me by James K. Smith and Francis C. Smith, Special Agents of the Intelligence Division, Internal Revenue Service that they have reason to believe that on the premises known as 2806 Westwood Avenue, Nashville, Tennessee, further described as being the fourth house on the north side of Westwood Avenue and being west from the intersection of Westwood Avenue and Natchez Trace as shown in attached sketch in the Middle Judicial District of Tennessee there is now being concealed certain property, namely bookmaking records, wagering paraphernalia consisting of bet slips, rundown sheets, account sheets, recap sheets and money used in or derived rom a bookmaking operation which are being used in violating of Section 4411, 4412 and 7203 of

here give allegyd grounds for search and seizure

the Internal Revenue Code of 1954 and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the

place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 25th day of April, 1960.

J. WASHINGTON MOORE,
U. S. Commissioner.

Return

I received the attached search warrant April 27, 1960, and have executed it as follows:

On April 27, 1960, at 1:00 o'clock P. M., I searched the premises described in the warrant and I left a copy of the warrant with Billy Nicholson together with a receipt for
name of person searched or owner or "at the place of search"
the items seized.

The following is an inventory of property taken pursuant to the warrant:

1 Locked Safe Cabinet.

1 Large Blackboard containing information relative to baseball events.

$6498.00 in currency.

Miscellaneous wagering paraphernalia (6 paper sacks) and 1 work sheet pad.

This inventory was made in the presence of Special Agents Eugene Brown, John Mask, Edward Keene and Billy Nicholson.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

JOE M. WILSON.

Subscribed and sworn to and returned before me this 27th day of April, 1960.

J. WASHINGTON MOORE,
United States Commissioner.

APPENDIX E

"The Court: All right. I believe you said you had a motion in this case.

Mr. Gilbert: If the Court please, I think we have one stipulation in regard to the affidavit in this cause. As I stated to Your Honor, we are going to hear it on the affidavits and no proof; and here is a stipulation in order to correct or amplify one matter that is in the affidavit.

I believe, if Your Honor please, that there is a statement in this affidavit that the defendant, Billy Nicholson, is a known gambler and bookmaker in the Nashville area (reading) 'and has been arrested by city and federal law enforcement officers in connection with gambling and bookmaking activities. When arrested by the Federal officers, Nicholson was found to be conducting a bookmaking operation from the address of 2806 Westwood Avenue, Nashville, Tennessee.'

Our stipulation as I understand it (Mr. Cole can correct me on this if I am in error) is that this raid mentioned in the affidavit was made in 1955, and there was a no true bill. In regard to the allegation that he had been arrested by city and federal law enforcement officers, he had been arrested in 1951, or prior thereto by the City of Nashville, but no conviction; and, according to the records, there had been no convictions of the defendant as a bookmaker at the time that this raid was made in 1960.

The Court: There had been no convictions?

Mr. Gilbert: No convictions; no, sir.
Is that correct?

Mr. Cole: That's correct."

Tr. pp. 5-6.

Q. "We all know, Mr. Smith, that you have been here with the Treasury Department for sometime and that you have made numerous surveillances and raids and so forth,

and that you have also made affidavits on many occasions that you would see people going in and out and carrying paper sacks and so forth, characteristic of a numbers operation or a bookmaking operation, and that these events would happen at a certain or a particular or a special time. Now; what surveillance did you make of Billy Nicholson's home?

A. The only surveillance we made of his home was to determine whether or not Billy Nicholson was still residing there, and we did see him sitting out on the sun porch on a few occasions."

Tr. p. 58.

Q. "Well, based on your answers, I will just flat out ask you if you have any information, either by word of mouth from somebody else or any written record that Billy Gilbert Nicholson has within the period of the last five years accepted a wager?

A. All the—Any records that he might have were destroyed by him out there in that fire, so as to that, I don't have any—we did not get any out there. No, sir."

Tr. p. 60.